1997

The State of Utah v. Brandon David Wright : Reply Brief

Utah Court of Appeals

Jan Graham; Attorney General; Attorney for Appellee.
Linda M. Jones; Deborah Kreeck Mendez; Salt Lake Legal Defender Association; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. BRANDON DAVID WRIGHT, Defendant/Appellant.	: : : : : : : : :	DOCKET NO. 970248-CA Case No. 970248-CA Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

LINDA M. JONES, #5497
DEBORAH KREECK MENDEZ, #5743
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM
ATTORNEY GENERAL
BRENT A. BURNETT
ASSISTANT ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

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SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM
ATTORNEY GENERAL
BRENT A. BURNETT
ASSISTANT ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

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THE STATE'S ARGUMENT CONCERNING THE STANDARD USED IN DETERMINING A REDUCTION IN SENTENCING EMPLOYS AN INCORRECT ANALYSIS AND MISCONSTRUES THE STATUTE AND PERSUASIVE CASE LAW.

A. THE STATE HAS EMPLOYED AN INCORRECT ANALYSIS IN ASSERTING THAT THE RIGID STANDARD USED BY THE TRIAL COURT IN DETERMINING A DISCRETIONARY SENTENCING MATTER WAS APPROPRIATE.

Defendant Brandon Wright ("Wright") has challenged the manner in which the trial court applied Utah Code Ann. § 76-3-402 (1995), in this case. That Section provides the following:

> (1) If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court *may* unless otherwise specifically provided by law enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.
>
> * * *
>
> (3) An offense *may* be reduced only one degree under this section unless the prosecutor specifically agrees in writing or on the court record that the offense *may* be reduced two degrees. In no case *may* an offense be reduced under this section by more than two degrees.

(Emphasis added).

In this matter, Wright pled guilty to aggravated robbery, a

first degree felony. In connection with the plea, the state twice stipulated on the record to a reduction in sentencing (R. 69 and 96), so that the offense would be punished as a second degree felony. The trial court refused to reduce the sentence on the following basis:

> I believe *the standard that I'm required to consider* in determining whether or not to sentence a person, who has pled guilty to a first degree to a lesser sentence, that is a second degree felony, is *there is some basis that is required by the interest of justice*. And I can't find any in this case. The reasons that you suggest, Ms. Kreeck-Mendez[, counsel for Wright], are rational reasons, but that's not the basis in the statute so the motion [to reduce the sentence] is denied.

(R. 96 (emphasis added).) Wright maintains that the trial court employed an incorrect standard in connection with ruling on the matter.

1. The State Is Unclear with Regard to the Standard Applicable to Trial Courts in Reducing Sentences.

In its brief, the state asserts that it is "impossible to determine exactly what Judge Hanson meant by the [words challenged on appeal] and what standard the trial court applied." (State's Brief ("S.B.") at 8.) Yet the trial judge's words are set forth verbatim in the record and are undisputed with respect to the standard the trial court applied in determining reduction of Wright's sentence: "*the standard that I'm required to consider*" is whether "*there is some basis that is required by the interest of justice*." (R. 96.)

As set forth in Wright's opening brief, Utah case law has given meaning to the standard articulated by the trial judge. The standard that "requires" a trial judge to act in the

"interest of justice" is rigid providing the trial court with the least amount of discretion. See State v. Snyder, 932 P.2d 120, 125, 132 (Utah App. 1997) (trial court is required to engage in specific analysis to determine whether the interests of justice "*will best be served*" in ruling on specific evidentiary matter); State v. Nelson, 725 P.2d 1353, 1356 n. 3 (Utah 1986) (trial court *must* make in-depth evaluation of proposed evidence and consider specific factors in determining whether interests of justice will best be served); State v. Bell, 785 P.2d 390 (Utah 1989) (legislative enactments will not be stricken "*unless the interests of justice require the same*" under specific and limited circumstances -- striking a legislative enactment is not discretionary with the trial court); Anderson v. Public Service Comm'n of Utah, 839 P.2d 822, 827 (Utah 1992) ("as a general rule, estoppel may not be invoked against a government entity," except in "unusual circumstances 'where it is plain that the *interests of justice so require*'"); State v. Casarez, 656 P.2d 1005 (Utah 1982) (court determined phrase "*as the interest of justice requires*" created a rare possibility; standard did not provide trial court with broad discretion to act).

The state does not dispute that Utah appellate courts have interpreted the standard identified by the trial court to be rigid. (See S.B. in general.) Rather, the state suggests that the trial court is not afforded wide discretion in determining reduction of sentencing.

The state asserts that while language in State v. Lipsky,

608 P.2d 1241 (Utah 1980), recognizes that discretion is afforded the trial court in exercising numerous alternatives available to a defendant in sentencing, "Lipsky did not hold that the standard to be followed by the trial court in determining whether or not to reduce a sentence was a very wide discretion as claimed by the defendant." (S.B. at 9-10.) The state's claim is perplexing.

The Utah Supreme Court's language in Lipsky is clear:

> [The trial] court in fact has *very wide discretion* in sentencing. A court may sentence a defendant to a prison term, impose a fine, *enter judgment for a lower category of offense pursuant to § 76-3-402*, place him on probation, disqualify him from public or private office pursuant to § 76-3-201, sentence the defendant to serve prison terms concurrently or consecutively, order the defendant to pay restitution, or suspend a prison sentence. As pointed out in the dissent of Justice Wilkins in Reddish v. Smith, supra, *this wide variety of alternatives not only permits, but absolutely requires, the exercise of discretion*.

Lipsky, 608 P.2d at 1244 (emphasis added); see also State v. Theison, 709 P.2d 307, 308 n.1. (Utah 1985); State v. Brooks, 631 P.2d 878, 879 (Utah 1981) (trial court may reduce sentence in accordance with its "statutory prerogative"); State v. Harding, 576 P.2d 1284 (Utah 1978).

The state's assertions are in conflict with Utah law. "Wide discretion" is afforded the sentencing court in determining reduction. Here, the trial court employed a rigid standard.

2. In Its Attempt to Define the Standard Available to the Trial Courts in Sentencing Matters, the State Neglects Mandatory Versus Permissive Indicators.

The state also claims that notwithstanding the limited discretion afforded a court under the standard articulated by the

trial judge in this matter, and the wide latitude afforded a trial court as identified in Lipsky in considering sentencing matters, the trial court in this case applied the appropriate standard in determining reduction of Wright's sentence.

To support that claim, the state focuses on the phrase "interest of justice" as used by the trial court (R. 96), and asserts that phrase is at the heart of Wright's challenge on appeal. The state also seeks to define the phrase "unduly harsh" as set forth in Section 76-3-402(1). The state misapprehends Wright's challenge on appeal, and misconstrues the plain language of Section 76-3-402(1).

With respect to the trial court's use of the phrase "in the interest of justice," Wright has acknowledged in his opening brief that such interests and the trial court's ability to exercise wide discretion can co-exist.

> In other matters, case law and statutory law allow the courts to exercise "discretion" to further the "interests of justice." See Utah R. Civ. P. 51 (1997) ("[T]he appellate court, in its discretion and in the interests of justice may review the giving of or failure to give an instruction"); Jensen v. Morgan, 844 P.2d 287, 292 (Utah 1992) (trial court in its discretion may allow pleading amendments in the interests of justice under Utah R. Civ. P. 15); Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

(Brief of Appellant, dated June 11, 1997, at 7.)

The focus of Wright's challenge on appeal is not use of the phrase "interest of justice." Wright is challenging the court's determination that it can only reduce the sentence if the interests of justice so mandate.

Here, the trial court expressed that it was required to

exercise the most restrictive amount of discretion in determining the matter. The trial court stated it could not act unless the interests of justice "*required*" the action. The term "required" is commanding, mandatory, demanding. It is synonymous with "must" and "shall," which are interpreted as "mandatory unless some compelling reason indicating a contrary intent appears." Glenn v. Ferrell, 304 P.2d 380, 382 (Utah 1956); see also Jones by and through Jones v. Bountiful City Corp., 834 P.2d 556, 559 (Utah App. 1992).

The statute on the other hand is drafted in terms of "permissive" conduct. The court "may . . . enter a judgment . . . for the next lower degree of offense." Utah Code Ann. § 76-3-402(1).

"The use of the term 'may' gives the trial court discretion . . . . According to its ordinary construction the term 'may' means permissive . . . ." Crockett v. Crockett, 836 P.2d 818, 820 (Utah App. 1992). The statute empowers the trial court to act under the more lenient standard by specifically providing that the trial court "may" reduce the sentence. Utah Code Ann. § 76-3-402(1). Pursuant to the plain language of the statute, the trial court has discretion in reducing sentences.

With regard to the state's discussion concerning the phrase "unduly harsh," Section 76-3-402(1) simply provides that if the court "regards" the factors set forth in the statute and "concludes" the sentence as imposed is "unduly harsh," the trial court "*may*" reduce the sentence. The unduly harsh language is irrelevant with respect to determining the level of discretion

available to the trial court in deciding the reduction issue. Stated another way, the statute permits the trial court to reduce a sentence if it is unduly harsh. Likewise, after having "regarded" the factors, the trial court *may not* reduce the sentence. The plain language of the statute is permissive.

The crux of Wright's appeal is that the trial court did not recognize that the plain language of the statute and the decision in Lipsky provided the trial court with "wide discretion" in determining reduction of Wright's sentence; the trial court "believe[d]" the standard was rigid. In describing its authority to reduce a sentence, the trial court used language that reflected it could only reduce the sentence if *mandated* or required by the interests of justice.

Since the state has failed to recognize the difference between the "mandatory" level of discretion and the "permissive" level of discretion afforded to the trial court through the statutory language, its entire Point III is irrelevant. Here, the trial court imposed a mandatory level of discretion on itself, while the statute provided the permissive level of discretion.

B. THE STATE IS INCORRECT IN ARGUING THAT THE TRIAL COURT'S RULING ON WRIGHT'S MOTION DID NOT PRESERVE THE ISSUE ON APPEAL, AND/OR WRIGHT SUFFERED NO PREJUDICE WHERE THE TRIAL COURT EMPLOYED THE WRONG STANDARD IN REFUSING TO REDUCE HIS SENTENCE.

The state asserts Wright's motion to the trial court to reduce his sentence was insufficient to preserve his argument arising from the court's ruling on that motion. That assertion is incorrect. A motion is sufficient to preserve issues relating

thereto, particularly the ruling on the motion.

The state next relies on the Utah Supreme Court's decisions in State v. Elm, 808 P.2d 1097 (Utah 1991), and State v. Bywater, 748 P.2d 568 (Utah 1987), to assert this Court is precluded from considering Wright's issue on appeal. Those cases are not persuasive on that point.

With regard to Elm, 808 P.2d at 1097, the defendant argued on appeal that the trial court abused its discretion in connection with a sentencing matter. Id. at 1098-99. While the defendant failed to make a specific objection at the time of sentencing concerning the issue, id. at 1100, the Utah Supreme Court addressed the sentencing issue on the merits, taking into consideration the statute at issue, case law interpreting the statute, and the clear record concerning the trial court proceedings. Id. at 1098-99.

Like the defendant in Elm, Wright has asked this Court to consider the plain language of Utah Code Ann. § 76-3-402 at issue, case law identifying the court's discretion in considering sentencing issues, and the clear statements of the trial court as set forth in the record. The record compels the determination that the trial court exercised an inappropriate level of discretion in considering the reduction issue.

Also, in Elm the defendant argued his due process rights were violated during sentencing. The defendant did not raise the due process issue in the trial court. Notwithstanding "preservation" concerns, the Utah Supreme Court "examined the

records of the sentencing hearing and the arguments of both parties" to determine the merits of the issue, and found no obvious error. Elm, 808 P.2d at 1100.

This Court is not presented with the same problems faced by the Elm court in considering the due process issue. Here, the record is clear. "Because this case involves a sentencing error rather than a trial error, the error is obvious on the face of the record . . . ." State v. Labrum, 925 P.2d 937, 941 (Utah 1996).

The state also relied on Bywater, 748 P.2d at 568. According to the Utah Supreme Court in Labrum, Bywater is inapplicable when the trial court is directed by *statute* or *judicial decision* to engage in the specific conduct at issue. Under the plain error doctrine, if the statute directs the trial court to enter specific findings of fact in connection with enhancing a sentence, Bywater is not controlling; Labrum is. Labrum, 925 P.2d at 940.

In Bywater, the defendant challenged the constitutionality of the minimum-mandatory sentencing scheme of Utah Code Ann. § 76-5-403.1 (which the court addressed on the merits), and he asserted that the "trial court erred in failing to make specific findings of fact and to articulate the standard of proof applied in reaching the determination that the sentence of middle severity should be imposed." Bywater, 748 P.2d at 568. "At the time Bywater was decided, no statute or judicial decision required an on-the-record recitation of facts supporting the

choice of the middle term of severity. . . Because the trial court in Bywater apparently complied (although somewhat cursorily) with [the statutory] requirement, failure to make specific findings of fact could not have been plain error." Labrum, 925 P.2d at 940.

Bywater is not applicable to this case. The trial judge in Wright's case applied the wrong standard *as dictated by statute and judicial decision.* The trial court did not comply with plain statutory language. Labrum governs here and supports that this Court is not precluded from addressing the merits of Wright's issue on appeal. Labrum, 925 P.2d at 939-41.

Finally, the state claims that the plain error doctrine does not apply in this case, since "a defendant must demonstrate three points: first that an error exists, second, that the error should have been obvious to the trial court, and third, that the error was harmful." (S.B. at 9 (citing State v. Morrison, 937 P.2d 1293, 1296 (Utah App. 1997)).)

According to the state, Wright cannot establish the first and second points since Lipsky does not support providing the trial court with "wide discretion" in determining reduction of sentences pursuant to Section 76-3-402(1). Also, the state asserts that the trial court's imposition of a mandatory standard is consistent with the permissive language of Section 76-3-402(1). The state is incorrect. As set forth above, it has disregarded compelling and binding language in Lipsky, see A.1., and misapprehends the difference between language that "requires"

action, and that which makes action permissive with use of the term "may." See A.2., supra.

With regard to the "third point," the state asserts that assuming the trial court committed plain error by applying the wrong standard, "defendant has failed to show that he has been harmed by the alleged error." (S.B. at 11.) In support of that claim, the state relies on comments made by the trial judge in rejecting a request for probation, and claims that such comments "led the trial court to deny the motion to reduce the sentence." (S.B. at 11.) The state is incorrect.

In considering the reduction in sentence, the trial judge expressed that his hands were tied with respect to the issue unless the interests of justice required the reduction. The court then stated that Wright's counsel had presented "rational reasons" supporting the reduction. However, because the reasons did not meet the rigid standard, he could not reduce the sentence. (R. 96.) The trial judge did not suggest that his bases for rejecting probation were applicable in determining the reduction in sentence. Indeed, the trial judge's statements concerning probation were not made in connection with his ruling on the request to reduce the sentence. (See R. 96-97 (concerning reduction in sentencing), and 98-99 (concerning probation).)

The state also asserts there is "no reasonable likelihood of a different result" if the trial court had employed the correct standard. Yet, in this case the court had broader discretion to determine the issue than it realized, and it expressed that

Wright presented rational reasons for reducing the sentence. In addition, the state stipulated twice to the reduction in sentencing. Prejudice exists when it is unclear whether the trial court would have reached the same result without the error. The trial court offered statements suggesting that it may have ordered reduction of the sentence by one degree, but could not because the stringent standard was not satisfied. Based on the record it is not clear how the trial court would have ruled in this case if it had applied the more lenient, correct standard. The error is prejudicial. See State v. Dunn, 850 P.2d 1201, 1209 (Utah 1993) (in applying the prejudice prong in considering the effects of an erroneous instruction, court determined error was prejudicial simply because it could not be sure of the basis for the jury's determination).

The issue on appeal in this case simply requires the Court to consider the trial court's uncontroverted statement in the transcript and apply the law. Based on the trial court's statements, it applied the wrong standard to determine whether the sentence should be reduced.

CONCLUSION

Wright respectfully requests that the Court reverse the judgment of the trial court and remand the case for further proceedings.

SUBMITTED this 9th day of October, 1997.

LINDA M. JONES
DEBORAH KREECK-MENDEZ
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 9th day of October, 1997.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this ____ day of _____, 1997.

_____